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NEXSEN | PRUET

J. David Black
Associate
Admitted in SC

August 11, 2005

HAND DELIVERED

Charles L.A. Terreni
Chief Clerk/Administrator
South Carolina Public Service Commission
Synergy Office Park
101 Executive Center Drive
Post Office Drawer 11649
Columbia, South Carolina 29211

**Re: Coastal Electric Cooperative, Inc. vs. South Carolina Electric &
Gas Company / Docket Number 2005-154-E**

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Dear Mr. Terreni:

Enclosed for filing with the Public Service Commission is an original and eleven copies of the **Motion To Stay The Commission's Ruling On SCE&G's Motion To Dismiss** and **Coastal Electric Cooperative, Inc.'s Opposition To SCE&G's Motion To Dismiss** in the above referenced matter. Please return a copy of each, clocked-in, to me via our courier.

By copy of this letter and as evidenced by the attached Certificate Of Service, we are serving counsel of record with a copy of the above Motion To Stay and Opposition.

Thank you for your assistance.

With kind regards, I remain

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NEXSEN|PRUET

Charles L.A. Terreni
August 11, 2005
Page 2

Very truly yours,

A handwritten signature in black ink, appearing to read "J. David Black", with a long horizontal flourish extending to the right.

J. David Black

JDB/hjr

Enclosure

cc w/encl.:

James B. Richardson, Jr., Esquire/Patricia T. Smith, Esquire
Patricia Banks Morrison, Esquire
Frank R. Ellerbee, III, Esquire/Bonnie D. Shealy, Esquire
Shannon Bower Hudson, Esquire/Wendy B. Cartledge, Esquire

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2005-154-E

IN RE:

Coastal Electric Cooperative, Inc.,

Complainant,

vs.

South Carolina Electric & Gas Company,

Respondent.

**COASTAL ELECTRIC
COOPERATIVE, INC.'S OPPOSITION
TO SCE&G'S MOTION TO DISMISS**

Complainant Coastal Electric Cooperative, Inc. ("Coastal Electric") submits this opposition to SCE&G's Motion to Dismiss.

The Public Service Commission is an agency created and empowered by the General Assembly to determine territorial service assignments and service rights of electric utilities and electric cooperatives. As part of its authority, the Commission has authority to hear cases arising under the Territorial Assignment Act. This authority exists even when the circuit courts hold concurrent or appellate jurisdiction over the matter.

Although SCE&G filed an action against Coastal Electric in the Circuit Court arising out of the same set of facts in this case, the Commission's jurisdiction is proper under two jurisdictional doctrines. The first doctrine, primary jurisdiction, holds that where an agency possesses special competence in a body of law or regulatory scheme, the Court should defer to the agency pending its resolution. The second doctrine, exhaustion of administrative remedies,

holds that where an administrative remedy exists, a plaintiff must first exhaust its administrative remedies before seeking relief in the circuit court. Under both doctrines, the Commission has jurisdiction over this dispute, as it is a specialized agency authorized to determine service rights and to administer remedies provided under a regulatory scheme.

In this case, the Commission will apply its expert administrative knowledge to determine if a corridor right existed on the premises in favor of Coastal Electric and whether Coastal Electric served the premises prior to annexation. The Commission, as the regulator and interpreter of the Territorial Assignment Act and the rights to provide electrical service, will also determine whether any change in character of the service on the premises affects service rights. These are factual issues particularly within the Commission's area of expertise. The Commission is, therefore, the proper tribunal for hearing a case lying within its primary jurisdiction, where the Commission has regulatory expertise to make the decision. As will be shown below, the Commission should deny SCE&G's motion. In the alternative, the Commission should stay ruling on this issue pending resolution of Coastal Electric's motion to dismiss or stay filed with the Circuit Court.

PROCEDURAL BACKGROUND

In April of this year, SCE&G filed a Complaint with the Circuit Court, challenging Coastal Electric's right to continue serving the same premises it has served since 1960. In response, Coastal Electric filed in the Circuit Court a motion to stay or dismiss the action on the grounds that (1) the Public Service Commission ("Commission") has primary jurisdiction over SCE&G's dispute with Coastal Electric and (2) SCE&G has failed to exhaust its administrative remedies with the Commission. (Coastal Electric's Motion and Memorandum in Support are attached as **Exhibits A and B.**). As of August 11, 2005, the Circuit Court has not ruled on this

motion.

Coastal Electric also filed a Complaint with the Commission around the same time it filed its motion in the Circuit Court. SCE&G now challenges the Commission's jurisdiction.

FACTS

Coastal Electric has provided electric service at the premises located at 260 Lagrande Lane, Walterboro, South Carolina since 1960. Immediately prior to Wal-Mart acquiring the property, Coastal Electric served a brick house on the premises until it disconnected service for the house to be moved for construction of the Wal-Mart. Coastal Electric immediately installed temporary service for the Wal-Mart construction site. On December 2, 2003 and September 29, 2004, the City of Walterboro annexed certain property that included these premises. Coastal Electric continued to serve electricity to these premises and still continues to serve pursuant to S.C. CODE ANN. § 33-49-250.¹ Wal-Mart purchased the premises with the intent of building a Wal-Mart store.

ARGUMENT

I. THE PUBLIC SERVICE COMMISSION HAS PRIMARY JURISDICTION OVER THIS DISPUTE.

The doctrine of primary jurisdiction applies to claims that are cognizable by the courts but require the resolution of issues which, under a regulatory scheme, fall within the special competence of an administrative body. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970); *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956). Much like the rule requiring the exhaustion of administrative remedies, the doctrine of primary jurisdiction promotes proper relationships between the courts

¹ Section 33-49-250, before and after the 2004 amendment, allows a cooperative to continue serving all premises it already served on the date of annexation. The statute does not prevent changes in the nature or character of the service to such premises.

and administrative bodies charged with particular regulatory duties. *Western Pacific*, 352 U.S. at 63. South Carolina courts recognize the doctrine of primary jurisdiction. See *Medical Univ. of South Carolina v. Taylor*, 294 S.C. 99, 103, 362 S.E.2d 881, 884 (Ct. App. 1987).

There is no fixed test for applying this doctrine. Its application is a matter of judicial discretion. Deferring jurisdiction to an agency is typically appropriate where (1) desire for uniformity exists that would come from a specialized agency and (2) the agency has expert and specialized knowledge to handle the parties' dispute. *Western Pacific*, 352 U.S. at 64. If an agency's primary jurisdiction is proper, the agency should hear the matter, and the court should stay its proceedings pending the administrative resolution. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

In *South Carolina Public Serv. Authority v. Carolina Power & Light Co.*, 244 S.C. 466, 137 S.E.2d 507 (1964), the Supreme Court of South Carolina held that the determination of service rights between two utilities is a regulatory matter within the original jurisdiction of the Commission. In that case, the dispute involved the right to serve electricity to a new industrial plant in Georgetown. The plaintiff sought an injunction preventing the defendant from erecting a power line and supplying power. The defendant moved to dismiss on the ground that the lower court had no jurisdiction. Although that case did not concern the doctrine of primary jurisdiction, the Court held that the determination of service rights was a regulatory matter within the Commission's exclusive jurisdiction and that the lower court lacked jurisdiction. *Id.* at 511.

Here, the Commission is an administrative body created and empowered by the General Assembly to determine territorial service assignments and service rights of electrical utilities and electrical cooperatives. It has specialized knowledge and expertise to handle such matters. Although S.C. CODE ANN. § 33-49-250(1) allows an electrical utility to institute an action in

circuit court, the Commission's primary jurisdiction is proper here because it has the authority and jurisdiction to ascertain "service to be furnished" by electric utilities. S.C. CODE ANN. § 58-27-140. The Commission also has the authority to "enforce, execute, administer and carry out by its order, ruling, regulation or otherwise all the provisions of [Chapter 58, Title 27] or any other provisions of the law of this State regulating electrical utilities." Id. at § 58-27-220. Each electrical utility and each electrical cooperative must comply with every order, decision, direction, rule, or regulation made by the Commission. Id. at § 58-27-40.

SCE&G is an electric utility as defined by S.C. CODE ANN. § 58-27-10 and, therefore, is subject to the Commission's jurisdiction regarding regulatory matters of electric service. Coastal Electric is an electric cooperative subject to the Commission's exclusive jurisdiction to determine service rights under S.C. CODE ANN. § 58-27-40. The service rights of all electrical suppliers, except municipalities, arise from the Commission-administered Territorial Assignment Act, Title 58, Chapter 27, Article 5. The Commission is charged with regulating the service to be furnished by electrical utilities, and that includes the service to be furnished by Coastal Electric to the Wal-Mart premises. Id. at § 58-27-140.

The Commission will apply its expert administrative knowledge here to determine if a corridor right existed in favor of Coastal Electric and whether it served those premises prior to annexation. The Commission will also determine whether any change in character of the service on the premises makes any difference. These are factual issues particularly within the Commission's area of expertise. It therefore has primary jurisdiction over this dispute. Furthermore, the Commission's ruling will be based on a uniform application of the rules and regulations it is empowered to apply, further making primary jurisdiction proper.²

² The municipal exception to the Commission's exclusive regulatory authority created by *City of Aiken v. Aiken Electric Cooperative, Inc.*, 305 S.C. 466, 409 S.E.2d 403 (1991) does not apply here. In that case,

II. SCE&G IS REQUIRED TO EXHAUST ITS ADMINISTRATIVE REMEDIES WITH THE COMMISSION BEFORE FILING SUIT IN CIRCUIT COURT.

Generally, a plaintiff must exhaust its administrative remedies before seeking relief in the courts. *Staton v. Town of Pawley's Island*, 309 S.C. 126, 420 S.E.2d 502 (1992). The General Assembly created an administrative remedy for any electric supplier, whether an investor owned regulated monopoly or a cooperative, to settle a dispute over the right to provide electricity. The General Assembly vested the original jurisdiction over such disputes in an expert administrative agency, the Commission. In this case, SCE&G attempts to avoid this regulatory scheme. Thus, the Commission should hear this case under the doctrine of exhaustion of administration remedies. See, e.g., *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 412-13, 563 S.E.2d 109, 114-15 (Ct. App. 2002).

Two types of exhaustion of administrative remedies exist: one imposed by the judiciary and one imposed by statute. *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000); 73 C.J.S. *Public Administrative Law and Procedure* §38 (1980). The General Assembly created the statutory administrative process. It also allowed for some suits in circuit court under Section 33-49-250 (for further discussion why Section 33-49-250 does not help SCE&G, see Part III, below). Under the judicial doctrine of exhaustion of administrative remedies, the court may use its discretion to avoid adjudicating an otherwise valid civil action in order to allow the orderly performance of administrative functions best left to the administrative agency. *Ward*, 343 S.C.

the Court held the South Carolina Constitution empowered a municipality to file a service dispute in Circuit Court rather than before the Commission. As a result, the General Assembly's creation of exclusive authority in the Commission did not bind the municipality. While the Court noted that electrical service provided by a municipally franchised supplier equaled municipal service, it did not extend the right to ignore Commission authority to electrical utilities holding a municipal franchise. Furthermore, SCE&G's Complaint in its Circuit Court case does not base its rights to service upon its Walterboro municipal franchise; rather it bases its rights to service on territorial assignment by the Commission and amended Section 33-49-250. Thus, the municipal exception to Commission exclusive jurisdiction does not apply.

18 n.7, 538 S.E.2d at 248 n.7. The Commission provides an appropriate forum with substantial expertise on the operation of electrical utilities and territorial assignment. The Commission provides the exact type of administrative forum recognized in the judicial doctrine of exhaustion of administrative remedies, where a court should step aside and either dismiss or stay pending an administrative review of the issue.

SCE&G's Complaint in the Circuit Court essentially invokes declaratory relief. It asks this Court to declare Coastal Electric's service as illegal. Generally, a court will refuse declaratory relief where other more effective or appropriate remedies, such as an administrative review, remain available to the Plaintiff. *See, e.g., Garriss v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 389, 461 S.E.2d 819, 820-21 (1995); *Smith v. South Carolina Retirement Sys.*, 336 S.C. 505, 527-28, 520 S.E.2d 339, 351 (Ct. App. 1999).

In this case, considerations of public policy, judicial convenience, conservation of judicial resources, and judicial discretion all support requiring SCE&G to exhaust its administrative remedies before the Commission, rather than encouraging piecemeal litigation in the various circuit courts of this State regarding the highly regulated area of electric service. The statute under which a plaintiff sues may grant rights that could normally be pursued in circuit court. *Allen v. South Carolina Alcoholic Beverage Control Comm'n*, 321 S.C. 188, 193-94, 467 S.E.2d 450, 453 (Ct. App. 1996). Where a party has an administrative action to determine the core facts at issue, however, the party will normally be required to exhaust that administrative remedy. *Id.* As the Supreme Court of South Carolina stated: "Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde v. South Carolina Department of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994).

III. SECTION 33-49-250 PERMITS, BUT DOES NOT REQUIRE, AN ELECTRICAL UTILITY OR ELECTRICAL COOPERATIVE TO BRING AN ACTION IN CIRCUIT COURT.

SCE&G argues that Section 33-49-250 gives the Circuit Courts exclusive jurisdiction to hear disputes involving that statute. SCE&G, however, confuses a *permissive* grant of jurisdiction with an *exclusive* grant of jurisdiction. Nothing in Section 33-44-250 states or implies that actions must be brought in the Circuit Court. That Section instead states that “any affected supplier of electricity *may* institute an action in the Court of Common Pleas of the county in which the violation occurs[.]” S.C. CODE ANN. § 33-49-250 (emphasis added). The word “may” means literally “expressing possibility” or “expressing permission.” *Oxford American College Dictionary* 835 (2002). When the General Assembly uses the word “may” in a statute “it signifies permission and generally means the ac is optional or discretionary.” *Kennedy v. South Carolina Retirement Sys.*, 345 S.C. 339, 352-53, 349 S.E.2d 243, 250 (2001); *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980).

This means that an electric supplier has permission to sue in Circuit Court; it does not mean that an electric supplier *must* sue there. Under the doctrines of primary jurisdiction and exhaustion of administrative remedies, electric utilities and electric cooperatives may file an action before the Commission, even though the Circuit Court also holds concurrent jurisdiction.

IV. THE TERRITORIAL ASSIGNMENT ACT APPLIES INSIDE ANNEXED TERRITORIES.

SCE&G argues that, when a municipality annexes territory assigned by the Commission, the Commission is divested of jurisdiction to hear disputes regarding that territory. This misconception is apparently based on an unsupported, expansive interpretation of the municipality exception to Commission authority. See *City of Aiken v. Aiken Electric Cooperative, Inc.*, 305 S.C. 466, 409 S.E.2d 403 (1991). Because the city of Walterboro is not a

party to this dispute, the municipality exception to Commission authority does not apply here.

Although the Commission lacks authority to decide matters when the municipality is a party, the General Assembly granted the Commission authority to resolve disputes between electric utilities and electric cooperatives concerning the right to serve areas annexed by a municipality. Section 58-27-670 states the following:

(1) . . . Annexation may not be construed to increase, decrease, or affect any other right or responsibility a municipality, electric cooperative, or electrical utility may have with regard to supplying electrical service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58.

(2) No electric utility . . . shall furnish electrical service to any premises first requiring service in an area annexed by a municipality or incorporated after the effective date of this subsection where such premises is located (a) in an area assigned by the commission prior to annexation or incorporation to an electric cooperative or (b) in an electric supplier's corridor, as described in this chapter, lying within the boundaries of such area assigned by the commission prior to annexation or incorporation to an electric cooperative; however nothing in this subsection limits the power of an electric cooperative to serve in such areas, as provided in Section 33-49-250.

S.C. CODE ANN. § 58-27-670. This section contemplates that disputes between electric utilities and electric cooperatives will arise in the areas annexed by a municipality. As an agency authorized to enforce, execute, and administer the Territorial Assignment Act, the Commission has authority to resolve these disputes. See S.C. CODE ANN. §§ 58-27-40, -140 and -220.

V. RULE 12(b)(8) DOES NOT APPLY WHERE ONE ACTION IS PENDING IN COURT AND THE OTHER IS BEFORE AN ADMINISTRATIVE BODY.

South Carolina Rule of Civil Procedure 12(b)(8) states that a defendant may seek a dismissal if “another action is pending between the same parties for the same claim.” Rule 12(b)(8) does not apply here because the Commission has primary jurisdiction to hear this dispute while the Circuit Court action is stayed. Thus, even though the Circuit Court may have

concurrent jurisdiction over this matter, the Circuit Court may defer exercising jurisdiction under the theory of primary jurisdiction pending the Commission's ruling. If SCE&G and Coastal Electric then exhaust its administrative remedies, the Circuit Court then has jurisdiction to hear the dispute.

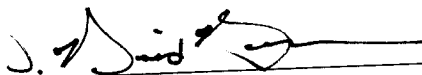
VI. THE COMMISSION SHOULD STAY ITS RULING ON THIS ISSUE UNTIL THE CIRCUIT COURT DECIDES COASTAL ELECTRIC'S MOTION TO DISMISS.

Coastal Electric filed a motion with the Circuit Court to stay or to dismiss this action pending resolution by the Commission. Under the doctrines of primary jurisdiction and exhaustion of administrative remedies, the Court, and not the Commission, has discretion to decide whether administrative resolution is proper. *See United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *Ward v. State*, 343 S.C. 14, 18 n.7, 538 S.E.2d 245, 248 n.7 (2000). Thus, even if the Commission ruled in Coastal Electric's favor, that decision would be moot if the Circuit Court retained jurisdiction. On the other hand, if the Commission ruled in favor of SCE&G, while the Circuit Court ruled in favor of Coastal Electric, this dispute would have no forum. Accordingly, the Commission should stay ruling on this issue pending a decision by the Circuit Court. Any decision on this issue would be premature and, depending on the Circuit Court's ruling, possibly moot.

CONCLUSION

The Commission has jurisdiction to hear regulatory matters involving the service of electricity by electric utilities such as SCE&G and cooperatives such as Coastal Electric. It has particular expertise in this matter and will apply a ruling based on the uniform application of the rules and regulations it is empowered to apply. Sound public policy favors the Commission making initial factual determinations regarding electrical service by utilities and cooperatives. The conservation of scarce judicial resources further favors exercising discretion to allow the

Commission to act as the initial fact finder in these cases particularly within its expertise. For these reasons, the Commission should retain jurisdiction over this matter. In the alternative, the Commission should stay its ruling on this matter and defer to the decision of the Circuit Court.



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Attorneys for Complainant
Coastal Electric Cooperative, Inc.

August 11, 2005

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

South Carolina Electric & Gas Co.,
Plaintiff,

vs.

Coastal Electric Cooperative, Inc., and Wal-
Mart Stores, Inc.,
Defendants.

IN THE COURT OF COMMON PLEAS

Case Number: 05-CP-15-292

**MOTION TO STAY OR, IN THE
ALTERNATIVE, TO DISMISS**

05 JUN 20 AM 9:38

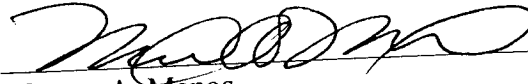
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

Defendant Coastal Electric Cooperative, Inc. ("Coastal Electric") moves this Court for an order staying this action pending administrative resolution or dismissing this action pursuant to S.C.R.Civ.P. Rule 12(b)(6). The grounds for this motion are that the Public Service Commission ("Commission") retains primary jurisdiction to hear disputes involving electric service provided by electric utilities and cooperatives. This action involves whether Coastal Electric may continue to provide service to premises that were annexed by the City of Walterboro. Plaintiff South Carolina Electric & Gas Co. ("SCE&G") filed this action, not the City of Walterboro and SCE&G does not claim its service rights as a franchisee of the City of Walterboro. SCE&G failed to exhaust the available administrative remedies before the Commission to determine the factual issues raised in the Complaint.

This Court, therefore, should stay this matter pending resolution by the Commission. In the alternative, this Court should dismiss in favor of the action filed by Coastal Electric before the Commission pursuant to Rule 12(b)(6).

This motion is supported by the allegations of the Complaint and the applicable law.

A memorandum of authorities supports this motion.



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June 17, 2005

Columbia, South Carolina

Attorneys for Defendant
Coastal Electric Cooperative, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS

South Carolina Electric & Gas Co.,

Plaintiff,

vs.

Coastal Electric Cooperative, Inc., and
Wal-Mart Stores, Inc.,

Defendant.

Case Number: 05-CP-15-292

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO
STAY OR, IN THE
ALTERNATIVE, TO DISMISS**

05 JUN 20 AM 9:38

SATINER COUNTY
COLLETON PLEAS
COMMON PLEAS

Defendant Coastal Electric Cooperative, Inc. ("Coastal Electric") submits this memorandum in support of its Motion to Stay or, in the Alternative, to Dismiss pending resolution of administrative proceedings.

BACKGROUND

Coastal Electric has provided electric service at the premises located at 260 Lagrande Lane, Walterboro, South Carolina since 1960. Immediately prior to Wal-Mart acquiring the property, Coastal Electric served a brick house on the premises until it disconnected service for the house to be moved for construction of the Wal-Mart. Coastal Electric immediately hooked up temporary service for the Wal-Mart construction site. On December 2, 2003 and September 29, 2004, the City of Walterboro annexed certain property that included these premises. Coastal Electric continued to serve electricity to these premises and still continues to serve pursuant to S.C. CODE ANN. §

33-49-250.¹ Wal-Mart purchased the premises with the intent of building a Wal-Mart store. Wal-Mart had a choice between two electric providers: either Coastal Electric as the utility currently providing service to the premises or South Carolina Electric & Gas Company, Inc. (“SCE&G”). Wal-Mart chose Coastal Electric, which prompted SCE&G to sue.

The dispute between SCE&G and Coastal Electric lies within the particular administrative expertise of the Public Service Commission (“Commission”), the agency created and empowered by the General Assembly to determine territorial service assignments and service rights of electrical utilities and electrical cooperatives. The Commission will apply its expert administrative knowledge to determine if a corridor right existed on the premises in favor of Coastal Electric and whether or not Coastal Electric served the premises prior to annexation. The Commission, as the regulator and interpreter of the Territorial Assignment Act and the right to provide electrical service, will also determine whether or not any change in character of the service on the premises affects services rights. These are factual issues particularly within the Commission’s area of expertise. This Court should not proceed to hear a case lying within the primary jurisdiction of the Commission, where the Commission has regulatory expertise to make the decision.

Coastal Electric filed a declaratory judgment action and service determination claim before the Public Service Commission on May 17, 2005.

¹ Section 250, before and after the 2004 amendment, allows a cooperative to continue serving all premises it already served on the date of annexation. The statute does not prevent changes in the nature or character of the service on such premises.

ARGUMENT

I. THE PUBLIC SERVICE COMMISSION HAS PRIMARY JURISDICTION OVER THIS DISPUTE.

This Court should stay this action pending resolution by the Commission or dismiss this action because the Commission has primary jurisdiction over this dispute. The doctrine of primary jurisdiction applies to claims that are cognizable by the courts but require the resolution of issues which, under a regulatory scheme, fall within the special competence of an administrative body. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970); *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956). Much like the rule requiring the exhaustion of administrative remedies, the doctrine of primary jurisdiction promotes proper relationships between the courts and administrative bodies charged with particular regulatory duties. *Western Pacific*, 352 U.S. at 63. South Carolina courts recognize the doctrine of primary jurisdiction. *See Medical Univ. of South Carolina v. Taylor*, 294 S.C. 99, 103, 362 S.E.2d 881, 884 (Ct. App. 1987).

There is no fixed test for applying this doctrine and it is a matter of judicial discretion. Deferring jurisdiction to an agency is typically appropriate where (1) desire for uniformity exists that would come from a specialized agency and (2) the agency has expert and specialized knowledge to handle the parties' dispute. *Id.* at 64. If the court finds an agency's primary jurisdiction proper, it should refer the matter to the agency and stay the court proceedings pending the administrative resolution. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

In *South Carolina Public Serv. Authority v. Carolina Power & Light Co.*, 244 S.C. 466, 137 S.E.2d 507 (1964), the Supreme Court of South Carolina held that the

determination of service rights between two utilities is a regulatory matter within the original jurisdiction of the Commission. In that case, the dispute involved the right to serve electricity to a new industrial plant in Georgetown. The plaintiff sought an injunction preventing the defendant from erecting a power line and supplying power. The defendant moved to dismiss on the ground that the lower court had no jurisdiction. Although that case did not concern the doctrine of primary jurisdiction, the Court held that the determination of service rights was a regulatory matter within the Commission's exclusive jurisdiction and that the lower court lacked jurisdiction. *Id.* at 511.

Here, the Commission is an administrative body created and empowered by the General Assembly to determine territorial service assignments and service rights of electrical utilities and electrical cooperatives. It has specialized knowledge and expertise to handle such matters. Although S.C. CODE ANN. § 33-49-250(1) allows an electrical utility to institute a suit in circuit court, the Commission's primary jurisdiction is proper here because it has the authority and jurisdiction to ascertain "service to be furnished" by electric utilities. S.C. CODE ANN. § 58-27-140. The Commission also has the authority to "enforce, execute, administer and carry out by its order, ruling, regulation or otherwise all the provisions of [Chapter 58, Title 27] or any other provisions of the law of this State regulating electrical utilities." *Id.* at § 58-27-220. Each electrical utility and each electrical cooperative must comply with every order, decision, direction, rule, or regulation made by the Commission. *Id.* at § 58-27-40.

SCE&G is an electric utility as defined by S.C. CODE ANN. § 58-27-10 and, therefore, is subject to the Commission's jurisdiction regarding regulatory matters of electric service. Coastal Electric is an electric cooperative subject to the Commission's

exclusive jurisdiction to determine service rights under S.C. CODE ANN. § 58-27-40. The service rights of all electrical suppliers, except municipalities, arise from the Public Service Commission administered Territorial Assignment Act, Title 58, Chapter 27, Article 5. The Commission is charged with regulating the service to be furnished by electrical utilities, and that includes the service to be furnished by Coastal Electric to the Wal-Mart premises. Id. at § 58-27-140.

In this case, the Commission will apply its expert administrative knowledge to determine if a corridor right existed on the premises in favor of Coastal Electric and whether it served those premises prior to annexation. The Commission will also determine whether any change in character of the service on the premises makes any difference. These are factual issues particularly within the Commission's area of expertise and, therefore, it has primary jurisdiction over this dispute. Furthermore, the Commission's ruling will be based on a uniform application of the rules and regulations it is empowered to apply.²

² The municipal exception to the Commission's exclusive regulatory authority created by *City of Aiken v. Aiken Electric Cooperative, Inc.*, 305 S.C. 466, 409 S.E.2d 403 (1991) does not apply here. In that case, the Court held the South Carolina Constitution empowered a municipality to file a service dispute in Circuit Court rather than before the Public Service Commission. As a result, the General Assembly's creation of exclusive authority in the Public Service Commission did not bind the municipality. While the Court noted that electrical service provided by a municipally franchised supplier equaled municipal service, it did not extend the right to ignore Public Service Commission authority to electrical utilities holding a municipal franchise. Furthermore, SCE&G's Complaint in this case does not base its rights to service upon its Walterboro municipal franchise; rather it bases its rights to service on territorial assignment by the Public Service Commission and amended Section 33-49-250. Thus, the municipal exception to Public Service Commission exclusive jurisdiction does not apply and this Court should dismiss SCE&G's Complaint in favor of a determination before the Public Service Commission.

II. PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AND THE CLAIM SHOULD BE DISMISSED.

SCE&G's claim should also be dismissed for failure to exhaust administrative remedies. Generally, a plaintiff must exhaust its administrative remedies before seeking relief in the courts and the trial court retains sound discretion to dismiss a premature court claim. *Staton v. Town of Pawley's Island*, 309 S.C. 126, 420 S.E.2d 502 (1992). The General Assembly created an administrative remedy for any electric supplier, whether an investor owned regulated monopoly or a cooperative, to settle a dispute over the right to provide electricity. The General Assembly vested the original jurisdiction over such disputes in an expert administrative agency, the Commission. In this case, SCE&G attempts to avoid this regulatory scheme. Thus, this Court should stay or dismiss under the doctrine of exhaustion of administration remedies. See, e.g., *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 412-13, 563 S.E.2d 109, 114-15 (Ct. App. 2002).

Two types of exhaustion of administrative remedies exist: that imposed by the judiciary and that which is statutorily mandated. *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000); 73 C.J.S. *Public Administrative Law and Procedure* §38 (1980). Here, the General Assembly created the statutory administrative process. It also allowed for some suits in Circuit Court under Section 250. Under the judicial doctrine of exhaustion of administrative remedies, the court may use its discretion to avoid going forward with an otherwise valid civil action in order to allow the orderly performance of administrative functions best left to the administrative agency. *Id.* at n.7. The Commission provides an appropriate forum with substantial expertise on the operation of electrical utilities and territorial assignment. The Commission provides the exact type of administrative forum recognized in the judicial doctrine of exhaustion of administrative

remedies where a court should step aside and either dismiss or stay pending an administrative review of the issue.

SCE&G's Complaint essentially invokes declaratory relief. It asks this Court to declare Coastal Electric's service to be illegal. Generally, declaratory relief will be refused by a court where other more effective or appropriate remedies, such as an administrative review, remain available to the Plaintiff. *See, e.g., Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 389, 461 S.E.2d 819, 820-21 (1995); *Smith v. South Carolina Retirement Sys.*, 336 S.C. 505, 527-28, 520 S.E.2d 339, 351 (Ct. App. 1999).

In this case, the considerations of public policy, judicial convenience, conservation of judicial resources, and judicial discretion all support requiring SCE&G to exhaust its administrative remedies before the Commission, rather than encouraging piecemeal litigation in the various Circuit Courts of this State regarding the highly regulated area of electric service. The statute under which a plaintiff sues may grant rights which could normally be pursued in Circuit Court. *Allen v. South Carolina Alcoholic Beverage Control Comm'n*, 321 S.C. 188, 193-94, 467 S.E.2d 450, 453 (Ct. App. 1996). Where a party has an administrative action to determine the core facts at issue, however, the party will normally be required to exhaust that administrative remedy. *Id.* As the Supreme Court of South Carolina clearly stated: "Where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts." *Hyde v. South Carolina Department of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994).

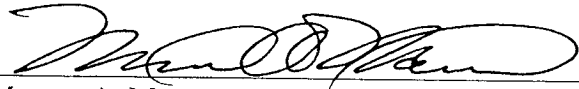
The modern trend in both South Carolina and federal courts requires judicial deference to administrative procedures in highly regulated areas. Whether relying upon the doctrine of primary jurisdiction or the requirement to exhaust administrative remedies, courts exercise discretion to allow expert administrative agencies involved in highly regulated fields to proceed to make the basic factual determinations and resolve disputes related to those fields. Allowing expert administrative agencies to proceed in an orderly manner to conduct the business entrusted them by the General Assembly makes sense for the judiciary as well as the administrative agency and can serve the resources of all involved.

This matter is already before the Commission as Coastal Electric filed a Complaint before it on May 17, 2005. Accordingly, this Court should stay or dismiss this action pending resolution by the Commission.

CONCLUSION

The Commission has jurisdiction to hear regulatory matters involving the service of electricity by electric utilities such as SCE&G and cooperatives such as Coastal Electric. It has particular expertise in this matter and will apply a ruling based on the uniform application of the rules and regulations it is empowered to apply. Sound public policy favors the Commission making initial factual determinations regarding electrical service by utilities and cooperatives. The conservation of scarce judicial resources further favors exercising discretion to allow the Commission to act as the initial fact finder in these cases particularly within its expertise.

This Court, therefore, should stay or dismiss this action pending resolution by the Commission under either the doctrine of primary jurisdiction or the requirement for exhaustion of administrative remedies.



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June 7, 2005

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS

South Carolina Electric & Gas Co.,

Plaintiff,

vs.

Coastal Electric Cooperative, Inc., and Wal-Mart Stores, Inc.,

Defendant.

Case Number: 05-CP-15-292

CERTIFICATE OF SERVICE

05 JUL 20 AM 9:38

PATRICIA T. SMITH
COLLETON COUNTY
COMMON PLEAS

The undersigned certifies that a copy of the foregoing **Motion to Stay Or, In the Alternative, to Dismiss and Memorandum in Support of Motion to Stay Or, In the Alternative, to Dismiss** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 17th day of June, 2005, to the addresses shown below.

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Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2005-154-E

IN RE:

Coastal Electric Cooperative, Inc.,

Complainant,

vs.

South Carolina Electric & Gas Company,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Defendant Coastal Electric Cooperative, Inc.'s Opposition To SCE&G's Motion To Dismiss** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail, on the 11th day of August, 2005, to the addresses shown below.

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